

JOINDER OF JOINT AND CONCURRENT TORTFEASORS

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INTRODUCTION

A brief definitive statement of the terms, joint and concurrent torts and joint and concurrent tortfeasors, is essential. Torts are either joint or independent. A joint tort is a single wrong jointly done and requires the existence of a concert of action or the breach of a joint duty. Joint tortfeasors have long been held jointly and severally liable as a matter of substantive law and joinable as defendants as a matter of procedural law.

An independent tort is a single wrong individually done. Situations sometime occur in which a single indivisible harm is sustained as a combined direct result of the independent, separate, but concurring tortious acts or omissions of two or more persons.¹ There is a prevailing tendency among courts to impose joint and several liability as a matter of substantive law for the single indivisible damage directly caused by such concurring wrongs and to permit joinder of such independent concurring tortfeasors as a matter of procedural law.

A cardinal principle is that before joint and several liability is imposed, the harm caused by the independent concurring torts must be of an indivisible nature which is not practically apportionable. Where the independent concurring torts have caused distinct and separate injuries to the plaintiff, or where some reasonable means of apportioning the damage is evident, the courts ordinarily will not hold the tortfeasors jointly and severally liable² and, of course, will not permit joinder.

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¹ The terms "concurring" or "concurrent" in this context have no reference to point of time, but rather to point of effect or consequence. *Garbe v. Halloran*, 150 Ohio St. 476, 83 N.E.2d 217 (1948).

² See *City of Mansfield v. Bristol*, 76 Ohio St. 270, 81 N.E. 631 (1907) which held that the parties were not jointly and severally liable for discharging sewage into a stream which intermingled and caused a nuisance; the court held that the amount of pollution by each contributor could be calculated and that therefore each was liable only for his portion of the damage. Accord: *Anderson v. Halverson*, 126 Iowa 125, 101 N.W. 781; *Nohre v. Wright*, 98 Minn. 477, 108 N.W. 865 (1906); *Miller v. Prough*, 203 Mo. App. 413, 221 S.W. 159 (1920), liability proportioned to number of dogs that defendant owned to total dogs doing damage; *Wood v. Snider*, 187 N.Y. 28, 79 N.E. 858 (1907); *Hill v. Chappel Bros.*, 93 Mont. 92, 18 P.2d 1106 (1932), where horses of several owners simultaneously trespassed on plaintiff's land; *Pacific Livestock Co. v. Murray*, 45 Ore. 103, 76 P. 1079 (1904).

SUBSTANTIVE AND PROCEDURAL LAW

The importance of understanding the fundamental distinction under present day practice between the "substantive" and "procedural" aspects of joint and concurrent torts has been well stated:

The joint and several liability imposed on joint tort-feasors or independent concurring tort-feasors producing an indivisible injury is a "substantive liability" to pay entire damages. This differs from what may be described as a "procedural liability" to be joined with other tort-feasors as defendants in a single action. An understanding of this distinction between the two concepts, and a recognition that one should not necessarily control or regulate the other but that each should be applied independently according to the facts of a case, is essential to a full grasp of the meaning of both and their relationship to each other. . . . The error that joinder was tied to substantive liability illustrates the confusion over the relation between the two concepts. This confusion arose from an inability of some courts to conceive of the two as separate and distinct legal tools, each having its own function. The later view more properly reflects the overall goal of modern procedure: trial convenience. This is recognized by the later codes and the present-day Federal Rules of Civil Procedure.³

In general the Ohio courts have refused to consider the substantive and procedural liability questions separately, and have emphasized only the substantive rights and liabilities of the parties involved. They have then conditioned joinder upon a prior determination of joint substantive liability, instead of approaching the problem independently from the procedural standpoint of trial convenience. This has caused undue confusion both in terminology and reasoning. As the Ohio law now stands, a joint and several substantive liability is still necessary to permit joinder as the cases hereinafter cited will show.

The Ohio statute on the subject of joinder of defendants was passed in 1853 as part of the act to establish a code of civil procedure and provided that:

Any person may be made a defendant, who has or claims an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein.⁴

This section, now Ohio Revised Code section 2307.19, has remained the same except that the phrase "of *the* question involved therein" has been broadened to "of *a* question involved therein." The statute has not been particularly dispositive of the question

³ 1 Harper and James, *The Law of Torts* 695-97 (1956).

⁴ 51 Ohio Laws 62, § 35 (1853).

here under review, and the law of joinder has evolved primarily by court decision. However, the phrase "who is a necessary party to a complete determination or settlement of a question involved therein" would seem to be broad enough to permit joinder not only of tortfeasors who are jointly and severally liable, but of those who are only severally liable as well, as long as the injury is single and indivisible. A counterclaim by one defendant against the other in a personal injury action, seeking to enforce an indemnity agreement between them, has been permitted in Ohio,⁵ but the petition and counterclaim were not tried simultaneously, and the exact trial procedure followed is not clear.

Legislative action to provide a carefully outlined joinder, cross-claim, and third-party practice in Ohio would be preferable, particularly in view of the Ohio courts' long adherence to the rule against joinder except where a joint and several substantive liability is said to exist.⁶

Decided cases exhibit four basic categories in which the courts have imposed joint and several liability for an indivisible harm: (1) where the tortfeasors act in concert in pursuance of a common design or plan; (2) where the tortfeasors fail to perform a common duty owed to the plaintiff; (3) where there is a special vicarious relationship between the tortfeasors; and (4) where the independent acts of several tortfeasors concur in point of consequence to produce a single indivisible harm.⁷

Since the subject under review covers only the joinder of tortfeasors, which is a procedural matter rather than substantive, further discussion shall be directed primarily to the procedural aspects of the subject.

JOINDER

1. Where the wrongdoers act in concert in pursuance of a common design or plan, and thereby produce an indivisible injury, such parties have long been held joinable as defendants in the same action both under the common law and under the procedural statutes.⁸ Such

⁵ *Kay v. Pennsylvania R. Co.*, 156 Ohio St. 503, 103 N.E.2d 751 (1952).

⁶ New York Civil Practice Act § 212, as amended; Fed. R. Civ. P. 13, 14 and 20(a).

⁷ 1 Harper and James, *op. cit. supra* note 3, at 697-8.

⁸ Prosser, Torts 1094, 1096 (1941); 1 Cooley, Torts § 73 (4th ed. 1932); 4 Restatement, Torts §§ 875, 876, but see § 881 concerning harm to land such as by flooding or pollution. *Thompson v. Johnson*, 180 F.2d 431 (5th Cir. 1950), defendants acted in concert in committing assault and battery; *Original Ballet Russe v. Ballet Theater, Inc.*, 133 F.2d 187 (2d Cir. 1943), wrongful destruction of business; *Pennington v. Hinch-Cliff*, 219 Ill. 159, 76 N.E. 47 (1905); *Lasher v. Littell*, 202 Ill. 551, 67 N.E.

actors have committed a joint tort and as joint tortfeasors are jointly and severally liable. This rule has its origin in early common law and has always been followed in Ohio.⁹ The basis for permitting joinder is that the plaintiff is suing on one cause of action which derives from the single but jointly consummated tort of the defendants.

2. The failure of two or more persons to perform a common duty with a resulting single injury to the plaintiff involves a matter of substantive law which in many jurisdictions places joint and several liability upon such tortfeasors. This rule is applicable to co-owners or co-maintainers of property, co-maintainers of party walls and party fences, and instances involving streets or sidewalks and adjoining property.¹⁰ It has even been said that the liability is the same even though as between themselves only one of the tortfeasors has the burden of performance and although their interests in the property causing the harm is unequal.¹¹ Joinder of such tortfeasors is allowed in some jurisdictions.¹² The common duty category has not been clearly delineated by the Ohio cases, as the following statements indicate.

In actions involving streets or sidewalks and adjoining property the respective parties owe a common duty to protect passersby; however, where the negligence or wrong of one tortfeasor is active and that of the other is passive, the Ohio courts have steadfastly refused to permit joinder although a single injury results. This refusal is on the sole premise that the active tortfeasor is primarily

372 (1903), malicious prosecution; *Boston v. Simmons*, 150 Mass. 461, 23 N.E. 210 (1890), conspiracy; *Green v. Davies*, 182 N.Y. 499, 75 N.E. 536 (1905), slander; *Orr v. Bank of United States*, 1 Ohio 36 (1821), assault and battery (dictum); *Michigan Miller's Mut. Ins. Co. v. Oregon-Washington R. Co.*, 32 Wash. 2d 256, 201 P.2d 207 (1948), fire damage to plaintiff's building caused by the concerted negligent burning of brush by the defendant railroads to clear their respective rights of way; *Berns v. Shaw*, 65 W. Va. 667, 64 S.E. 930 (1908), gambling; *Martens v. Reilly*, 109 Wis. 464, 84 N.W. 840 (1901).

⁹ *Maryland Casualty Co. v. Frederick Co.* (par. 3 of syllabus), 142 Ohio St. 605, 53 N.E.2d 795 (1944); *Clark v. Fry*, 8 Ohio St. 358 (1858); *Boyd v. Watt*, 27 Ohio St. 259, 267 (1875); *Orr v. Bank of U.S.*, *supra* note 8.

¹⁰ Restatement, Torts § 878 (1939); *Hayes v. Smith*, 62 Ohio St. 161, 56 N.E. 879 (1900); *Logsdon v. ABCD Construction Co.*, 103 Ohio App. 233, 141 N.E.2d 216 (1956); *Gibson v. Johnson*, 69 Ohio App. 19, 42 N.E. 689 (1941); *Lindsay v. Acme Cement Co.*, 200 Mich. 367, 190 N.E. 275 (1922).

¹¹ 4 Restatement, Torts § 878, comment *a* (1939).

¹² *Jack v. Hudnall*, 25 Ohio St. 255 (1887); *Veits v. Hartford*, 123 Conn. 428, 58 A.2d 389 (1948); *Spurling v. Incorporated Town of Stratford*, 195 Iowa 1002, 191 N.W. 724 (1923); *Fortinger v. National Biscuit Co.*, 116 Minn. 158, 133 N.W. 461 (1911); *Board of County Commissioners v. Shurts*, 10 Ohio App. 219 (1918).

liable and the passive tortfeasor is secondarily liable.¹³ Other jurisdictions permit joinder in this type situation.¹⁴

In actions involving the sale of unwholesome food the Ohio courts have likewise refused to permit joinder of the packer and retailer, even though each owes a common duty to the consumer and each is guilty of a concurrent negligent act resulting in a single harm to plaintiff. This again is on the sole premise that the liability of the packer is primary and that of the retailer is secondary.¹⁵

In such cases the plaintiff may sue either or both tortfeasors and collect his entire damage, but he may not join them as defendants in the same action. To permit joinder and cross-claims between such defendants would greatly expedite trial practice and accomplish more prompt and even justice between all parties.

3. Where there is a special relationship between the tortfeasors, but where one is charged with liability solely on "vicarious" or *respondeat superior* grounds, e.g., solely because of a legal relationship between the parties and not because of any act or omission on the part of the one so charged, there is several liability and the plaintiff may recover from either or both until his judgment is satisfied.¹⁶ In most jurisdictions such tortfeasors are joinable as defendants in the same action by court decision or by statute,¹⁷ and in other states they are not joinable but each may be sued in separate actions.¹⁸ Ohio is in the latter category.¹⁹

Ohio courts have refused to allow joinder of master and servant, or principal and agent, where the liability of the master or principal arises solely by reason of the doctrine of *respondeat superior* on the ground that the master or principal is only secondarily liable and

¹³ Maryland Casualty Co. v. Frederick Co., 142 Ohio St. 605, 612-13, 53 N.E.2d 795 (1944); Globe Indemnity Co. v. Schmitt, 142 Ohio St. 595, 53 N.E.2d 790 (1944); Hillyer v. East Cleveland, 155 Ohio St. 552, 99 N.E.2d 772 (1951); Herron v. Youngstown, 136 Ohio St. 190, 24 N.E.2d 708 (1940); Bello v. Cleveland, 106 Ohio St. 94, 138 N.E. 526 (1922); Morris v. Woodburn, 57 Ohio St. 330, 48 N.E. 1097 (1897).

¹⁴ Annot., 15 A.L.R.2d 1296.

¹⁵ Canton Provision Co. v. Gauder, 130 Ohio St. 43, 196 N.E. 634 (1935); Knies v. Armour & Co., 134 Ohio St. 432, 17 N.E.2d 734 (1938).

¹⁶ But if the servant is absolved of liability, no action can be maintained against the master. Losito v. Kruse, 136 Ohio St. 183, 24 N.E.2d 705 (1940).

¹⁷ Mecham, Agency (2d ed. 1903) § 2011; Annot., 59 A.L.R.2d 1066 (1958).

¹⁸ Annot., 59 A.L.R.2d 1067 (1958); Sinclair v. Gannett, 148 Me. 229, 91 A.2d 551 (1952).

¹⁹ Losito v. Kruse, *supra* note 16; French v. Central Construction Co., 76 Ohio St. 509, 81 N.E. 751 (1907); Clark v. Fry, *supra* note 9. Improper joinder may be waived by not objecting—Stevenson v. Hess, 10 Ohio L. Abs. 43 (Ct. App. 1931).

the servant or agent is primarily liable.²⁰ This again ignores the important element of trial convenience, and the rendering of prompt and even justice in any action over by the master against the servant.

Where the liability of the master arises independently and not by application of the doctrine of *respondeat superior*, joinder is allowed.²¹

4. Where an indivisible harm is proximately caused by the independent but concurrent tortious acts of two or more persons, joint and several liability results,²² and such tortfeasors may be joined as defendants in the same action.²³ The present law in Ohio on this subject is stated in paragraphs 1 and 2 of the syllabus of the case of *Meyer v. The Cincinnati Street Ry. Co.*,²⁴ as follows:

1. Where damage or injury is proximately caused by independent but concurrent wrongful acts of two or more persons, joint liability results, and such wrongdoers may be joined as defendants even though they may not have acted in concert in the execution of a common purpose and the want of care of such defendants may not have been of the same character, and joint or several judgments may be rendered against such wrongdoers.

2. The predicate of joint liability is not necessarily limited to the commission of a joint act or joint tort. (Paragraph three of the syllabus of *Stark County Agricultural Society v. Brenner*, 122 Ohio St. 560, overruled.)

²⁰ *Shaver v. Shirks Motor Express Co.*, 163 Ohio St. 484, 127 N.E.2d 355 (1955); *Albers v. Great Central Transp. Co.*, 145 Ohio St. 129, 60 N.E.2d 669 (1945)—both cases involved certificated carriers; *Losito v. Kruse*, *supra* note 16.

²¹ *Schoedler v. Motometer Gauge Co.*, 134 Ohio St. 78, 15 N.E.2d 598 (1938); *Wenzlanski v. Allen*, 51 Ohio App. 482, 1 N.E.2d 1018 (1936); *Kaiser v. Rodenbaugh*, 33 Ohio Op. 196, 68 N.E.2d 239 (1946) (master's alleged negligent hiring of the servant).

²² *Restatement, Torts* § 879 (1939), as qualified by § 881; *Boyd v. Watt*, 27 Ohio St. 259 (1875), where the defendant's unlawful sales of whisky concurred with like independent acts of a third party to produce habitual drunkenness in plaintiff's husband, such tortfeasors were held to be jointly and severally liable as a matter of substantive law; *Sibila v. Bahney*, 34 Ohio St. 399 (1878); *Transfer Co. v. Kelly*, 36 Ohio St. 86 (1880)—both cases involving independent concurring acts of negligence; *Cleveland Ry. Co. v. Nickel*, 120 Ohio St. 133, 165 N.E. 719 (1929). For an analysis and discussion of this subject in depth see 1 Harper and James, *op. cit. supra* note 3, at 701-709.

²³ 4 *Restatement, Torts* § 882; *Wery v. Seff*, 136 Ohio St. 307, 25 N.E.2d 692 (1940), the defendant father negligently entrusted his car to the defendant son, and the son negligently operated it, injuring plaintiff; *Maumee V. Ry. Co. v. Montgomery*, 81 Ohio St. 426 (1910); *Baltimore & O. R. Co. v. Baillie*, 112 Ohio St. 567 (1925); *Cincinnati Str. Ry. Co. v. Murray*, 53 Ohio St. 570, 579 (1895); *Contra: Stark County Agric. Soc. v. Brenner*, 122 Ohio St. 560, 172 N.E. 659 (1930). For cases holding a hospital and doctors jointly liable and joinable for their separate but concurring acts of negligence, see *Shawd v. Donohoe*, 97 Ohio App. 252, 125 N.E.2d 368 (1954), and *Blanton v. Sisters of Charity*, 82 Ohio App. 20, 79 N.E.2d 688 (1948).

²⁴ 157 Ohio St. 38, 104 N.E.2d 173 (1952).

The terms "independent concurring torts" and "independent concurring tortfeasors" are sometimes used to describe this type of situation.²⁵

In the case of *Stark County Agricultural Society v. Brenner*,²⁶ an erroneous rule was laid down:

3. Joint liability for tort *only* lies where wrongdoers have acted in concert in the execution of a common purpose and where the want of care of each is of the same character as the want of care of the other. (Emphasis added.)

No authority was given in the above case to support the restrictive proposition stated. This statement was a bone in the throat of the courts of Ohio until it was overruled in fact by *Wery v. Seff*²⁷ in 1940, and overruled expressly by the *Meyer* case²⁸ in 1952, wherein the principles involved are soundly stated by the reporting judge:

The opinion and paragraph three of the syllabus of the *Brenner* case are based upon the concept that joint liability arises only from the commission of a joint tort, *i.e.*, the joint commission of a single wrongful or tortious act. This is in accord with the early English view. In the strict sense, "joint tort" originates in action of the mind, volition, concert of action, common purpose. The conclusion that joint liability can arise only from joint tort fails to recognize the more modern authorities which consider the fact that independent concurrent acts may produce or result in a single injury. It was in this beclouded atmosphere of thought concerning joint tort and joint liability that reference was made in the *Brenner* case to the necessity of the "want of care of each" being "of the same character as want of care of the other" to justify joinder of defendants. (Emphasis supplied.) "Joint liability" which is referred to in paragraph three of the syllabus in that case and which it was said cannot exist unless the want of care of the wrongdoers is of the same character, is there referred to in the sense of liability arising from the commission to a *joint tort* as hereinabove defined. In this lies the error of that paragraph of the syllabus and from this stem the uncertainty and confusion which have been experienced in applying the language therein used. The concept that "joint liability" can arise only from the commission of a "joint tort" is fundamentally unsound. Joint *liability* can arise from the concurrent commission of independent wrongful acts, each having causal connection with the injury or damage complained of.²⁹

From the foregoing it is apparent that any statements on the general subject of joinder of tortfeasors contained in Ohio cases from

²⁵ 1 Harper and James, *op. cit. supra* note 3, at 702.

²⁶ 122 Ohio St. 560 (1930).

²⁷ 136 Ohio St. 307, 25 N.E.2d 692 (1940).

²⁸ *Meyer v. Cincinnati St. Ry.*, *supra* note 24.

²⁹ *Id.* at 40-41.

1930 to 1940, and even until 1952, should be approached with caution, and should be considered as of doubtful value unless the *Brenner* rule was expressly not applied.

The wrongful act of one defendant need not be of the same character as that of another to permit joinder, and the fact that one is guilty of wanton misconduct and the other of negligence is not significant in determining that they may be joined as defendants.³⁰

There are several reported cases, however, which warrant careful scrutiny in light of the basic requirement that single indivisible injury must result from the independent concurring torts before joinder is permissible.³¹ Although each case speaks of a single injury, it is obvious that there were two injuries although they were close in point of time and difficult, or perhaps impossible, to assess as to exact extent. *Quaere*: Is it proper to place the burden of separating a series of injuries upon the defendants who do not have the burden of proof?

The case of *Schindler v. The Standard Oil Co.*,³² which held that the trial court had erroneously sustained demurrers to the petition for misjoinder, contains the most recent statement of the Ohio Supreme Court on the subject of joinder of parties:

1. Where two or more persons, under circumstances creating primary liability, either, by a combination of their actions, create a nuisance causing damage or, by their concurrent negligence, directly produce a single indivisible injury, and where it is impossible to measure or ascertain the amount of damage created by any one of the persons, such persons, as jointly and severally liable, may be joined as defendants in an action, based upon such conduct, by one who has been damaged thereby.

This law is sound as stated. It is to be noted particularly that the alleged tortious acts of the respective defendants occurred during various periods from 1931 to 1948, but that a single indivisible harm was alleged. The court distinguished the case of *City of Mansfield v. Bristol*³³ on this ground alone. The court refused to make any basic distinction between the tortious acts of nuisance and of negligence insofar as joinder of parties was concerned, and in addition permitted joinder of both such causes of action.

³⁰ *Glass v. McCullough Transfer Co.*, 159 Ohio St. 505, 112 N.E.2d 823 (1953).

³¹ *Hardware Mut. Casualty Co. v. Peroz*, 110 Ohio App. 390, 169 N.E.2d 621 (1958), involving two collisions with obvious separate damage by each; *English v. Aubry*, 90 Ohio App. 121, 103 N.E.2d 828 (1950), two collisions; *Micelli v. Hirsch*, 52 Ohio L. Abs. 426, 83 N.E.2d 240 (1948), where a pedestrian died when hit and knocked down by one vehicle and then struck by another.

³² 166 Ohio St. 391, 143 N.E.2d 133 (1957).

³³ 76 Ohio St. 270, 81 N.E. 631 (1907).

MISJOINDER

With the right of joinder go the risks of misjoinder. There are numerous cases reported wherein jurisdiction over the person of one or more defendants suddenly has been lost at some stage of the proceedings by reason of misjoinder. The action must then be brought anew against such party if it is not then barred by the statute of limitations.

In order to give a court jurisdiction under the statute over the person of a nonresident of the county,³⁴ the averments of the petition and the proof at the trial must show that the resident and nonresident defendants are jointly liable as a matter of substantive law and, therefore, properly joined.³⁵

A basic principle involved is that such an attack upon jurisdiction must be made at the first opportunity.³⁶ Thus, if the misjoinder appears on the face of the petition, objection must be raised by motion to quash or by demurrer; otherwise it may be raised by the answer.³⁷ An answer in the form of a general denial has been held sufficient to preserve the issue, where the point can properly be raised by answer,³⁸ but it is better form to raise the issue affirmatively in the answer after specifically disclaiming an intent to enter an appearance.

If the objection is properly raised by answer, and not otherwise waived, the court must order dismissal of the nonresident defendant as soon as misjoinder appears as a matter of law. This may be at the end of plaintiff's opening statement, at the close of plaintiff's case, at the close of all the evidence or at the close of trial. If the question of the legal liability of the defendants is submitted to the jury and it finds the resident defendant not liable, then there is obviously no joint liability and the court does not have jurisdiction over the person of the nonresident, and the action against him must be dismissed.

Fortunately for plaintiffs, the one year savings clause³⁹ of the statute of limitations has been liberally interpreted and applied in this type situation, and it is only where a defendant has been dismissed voluntarily, and not as the consequence of any action by the

³⁴ Ohio Rev. Code § 2703.14.

³⁵ *Canton Provision Co. v. Gauder*, *supra* note 15; *Gorey v. Black*, 100 Ohio St. 73, 125 N.E. 126 (1919); *Stark County Agric. Soc. v. Brenner*, *supra* note 23 (par. 5 of syllabus).

³⁶ *Glass v. McCullough*, *supra* note 30.

³⁷ *Scott v. Davis*, 173 Ohio St. 252 (1962).

³⁸ *Glass v. McCullough Transfer Co.*, *supra* note 30.

³⁹ Ohio Rev. Code § 2305.19.

court, that the saving clause has been held not to be applicable.⁴⁰ However, the loss of time and the disclosure during trial that may occur contra-indicate a knowledgeable misjoinder or a doubtful joinder under ordinary circumstances.

⁴⁰ *Cero Realty Co. v. American Mfrs. Mutual Ins. Co.*, 171 Ohio St. 82, 167 N.E.2d 774 (1960).